United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7120

B
P/S
BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

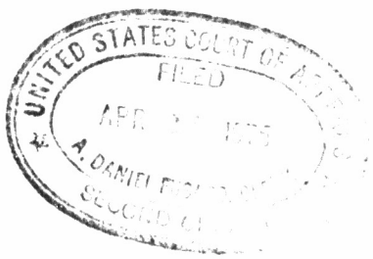
JOSE CORDOVA and AMELIA CORDOVA, individually and as next friend of HECTOR TORRES, a minor, and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

-vs-

JAMES REED, as Commissioner of the Department of Social Services of the County of Monroe, and on behalf of all other commissioners of local departments of social services in the State of New York, and ABE LAVINE, as Commissioner of the Department of Social Services of the State of New York,

Defendants-Appellees.



PLAINTIFFS-APPELLANTS' BRIEF

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STATEMENT OF ISSUES PRESENTED

1. Where a state statute excludes children from public assistance because they moved from out of state, is there a substantial constitutional question requiring convening a three judge court where the plaintiffs seek to enjoin its application and enforcement as violating equal protection and the right to travel?

The District Court held in the negative.

2. Must a plaintiff exhaust state judicial remedies prior to commencing an action under 42 U.S.C. section 1983 challenging such a statute?

The District Court held in the affirmative.

3. Must a plaintiff exhaust state administrative remedies when he challenges that statute solely on federal constitutional grounds?

The District Court held in the affirmative.

STATEMENT OF THE CASE

This is an appeal from a decision and order by the Hon. Harold P. Burke, and the resulting judgment, dismissing an action for failure to exhaust state judicial and administrative remedies and refusing to convene a three-judge court pursuant to 28 U.S.C. sections 2281 et seq.* where the plaintiffs' sole claim was under 42 U.S.C. section 1983 for the deprivation of federal constitutional rights.

The plaintiffs are a seven year old boy who came from Puerto Rico to Rochester, New York, and his aunt and uncle with whom he lives in Rochester (6,8).** Since an aunt and uncle are not responsible for the support of their nephew under New York law of general applicability, Social Services Law, section 101, even if the boy resides with them, the adult plaintiffs applied for public assistance for the boy under the Aid to Families with Dependent Children program (AFDC).

That public assistance application was denied by the Department of Social Services of the County of Monroe on the basis of section 382 of the New York Social Services

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* Statutes reproduced in statutory supplement, infra.

** References are to pages in appendix.

Law, subdivision (1) of which provides that anyone who accepts or brings a child into New York from elsewhere shall be liable for the child's support (15). Pursuant to that statute the boy's aunt and uncle were held liable for his support, so public assistance was denied (9-10,15).

The plain intent of this statute, both as enacted and applied, is to prevent children who come into New York from out of state, from being provided public assistance. Under subdivision (4)(b), for example, any person who brings a child into New York must remove him from the state within thirty days after written notice is given that the child has become a "public charge" during his minority. If the person fails to comply with that condition, he must forfeit that portion of a bond, which is required before bringing a child into the state, to reimburse the state or county for public assistance paid for the child. Social Services Law section 382(5).

The intent of the defendants in applying this section is equally clear. A worker in the local social services department wrote "Hector just came from Puerto Rico in September, and should be sent back to his mother. The case is being denied."(13) Subsequently that position was reiterated as follows: "By accepting and receiving Hector Torres into their home the Codovas [sic] have accepted the responsibility for his care and maintenance. Social Welfare Law [sic] 382.1."(15) In an affidavit in opposition

to the relief sought by the plaintiffs, counsel for the local social services commissioner stated, "The plaintiffs can immediately terminate their financial problem, if any, by returning the child to its mother in Puerto Rico."(23)* Likewise in an affidavit of counsel for the defendant State Commissioner, Abe Lavine, submitted in this Court in opposition to the plaintiffs' motion for an injunction or restraining order pending appeal and an expedited appeal, it is clear that the statute is designed to exclude the poor from New York. The statute was said to be "designed to ensure that ... persons ... do not bring a child into New York State who has no means of support. ..." Affidavit of David L. Birch, Deputy Assistant Attorney General, dated March 20, 1975, ¶4.

The plaintiffs challenged the denial of public assistance by contending solely that section 382 of the New York Social Services Law is unconstitutional (10-11). The statute violates equal protection since if the boy had come to live in Rochester from elsewhere in New York State, public assistance would have been available for him. The sole

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* That affidavit also analogized this case to immigration restrictions preventing immigrants from receiving public assistance, apparently under the misapprehension that Puerto Ricans are not American citizens, which, of course, they are (22).

basis for denying assistance for this child is that he came from out of state. Likewise the boy's right to travel is plainly restricted by this statute, just as a host of other unconstitutional welfare residency tests restricted that right.

The plaintiffs' sole claims being based on federal constitutional grounds, not the applicability of the statute to them or its plain meaning, they refused to proceed with state administrative proceedings which could not have produced a ruling on their constitutional claims and would have only delayed relief. They filed this action in the District Court, requesting the convening of a three-judge court, preliminary injunctive relief, and a temporary restraining order (9, 10, 14, 18).

The defendant State Commissioner of Social Services, Abe Lavine, moved to dismiss, alleging lack of subject matter jurisdiction and failure to state a claim (27). The defendant County Commissioner of Social Services, James Reed, by his attorney, filed an affidavit in opposition alleging failure to exhaust state judicial and administrative remedies, and failure to "state a cause of action," among other things (22). The jurisdictional defense was apparently predicated upon failure to exhaust state judicial and administrative remedies, as explained in the memorandum in support of the motion to dismiss, Point One. The defendant County Commissioner also answered, alleging those same

defenses, among others (33-34).

Judge Burke thereupon dismissed the case in a 3 1/2 page decision and order (39-42), citing but a single case which, in fact, holds quite to the contrary of that for which it was cited. Judge Burke's decision stated:

> The plaintiffs have an adequate remedy at law in the New York State Courts. They may not ignore administrative remedies and bring this action. [Citation omitted].
>
> I decline to take the necessary steps for the convening of a three judge court.

Contrary to Judge Burke's ruling, the plaintiffs have plainly raised a substantial constitutional question which can only be determined by a three-judge court. Equally clearly they need not exhaust state judicial remedies but are entitled to bring their federal constitutional claims under 42 U.S.C. section 1983 in federal court. Finally, the plaintiffs did not have to exhaust state administrative remedies. To do so is not required where a three-judge court should be convened and it would have been futile since administrative agencies cannot determine solely constitutional claims under section 1983.

ARGUMENT

POINT I

THERE IS A SUBSTANTIAL CONSTITUTIONAL QUESTION REQUIRING CONVENING OF A THREE-JUDGE COURT

The plaintiffs seek to enjoin the enforcement and operation of a state statute, section 382 of the New York Social Services Law, as being unconstitutional. Accordingly a three judge district court should be empaneled to hear and determine the case pursuant to 28 U.S.C. section 2281, unless the constitutional claims are wholly "insubstantial" Goosby v. Osser, 409 U.S. 512, 518 (1973).

The determination of whether the claim is so insubstantial that a three-judge court need not be convened is one which a District Court will rarely be able to make, under the standards recently set forth by the Supreme Court in Hagans v. Lavine, 415 U.S. 528 (1974). In that action where other provisions of the public assistance program were under constitutional challenge the Court held that a three judge court should be convened unless the claims were "essentially fictitious" or "obviously frivolous." (415 U.S. at 537). The basic criterion is whether "previous decisions of [the Supreme Court] ... foreclose the subject andleave no room for the inference that the question sought to be raised can be the subject of controversy." (Id. at 537). So, too, this Court reversed the granting of the defendant's motion to dismiss in Rosenthal v. Board of Education, 497 F.2d 726 (2d Cir. 1974), pointing out that where a situation

is not directly controlled by prior Supreme Court decisions a three judge court is required.

It is apparent that the statute challenged here, which works to deny public assistance to children who come into New York from out of state, raises serious and substantial constitutional questions. Insofar as children moving within the state are eligible for public assistance while those moving from without the state are ineligible there is an equal protection violation and there is also violation of the child's constitutional right to travel. When these claims are examined in light of prior Supreme Court decisions it is apparent that if any of the parties' contentions are foreclosed by previous decisions of the Court they are the contentions of the defendants which are foreclosed. The Supreme Court cases squarely support the plaintiffs.

In Shapiro v. Thompson, 394 U.S. 618 (1969) the Court held that durational residency requirements for public assistance violated both equal protection and the right to travel. The Court stated:

> in moving from State to State ... appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless necessary to promote a compelling governmental interest, is unconstitutional. (394 U.S. at 634).

Thereafter New York's residency requirement for public assistance was held unconstitutional in Gaddis v. Wyman, 304

F.Supp. 717 (S.D.N.Y. 1969), aff'd 397 U.S. 49 (1970). New York responded to that decision by enacting another residency test for public assistance, and it too was held unconstitutional on the same grounds. Lopez v. Wyman, 329 F.Supp. 483 (W.D.N.Y. 1971), aff'd 404 U.S. 1055 (1972). There Judge Curtin did just what the District Court here refused to do; he requested the convening of a three-judge court and issued a temporary restraining order.

In the years since those cases the Supreme Court has emphatically reiterated the constitutional infirmity of residency tests on several occasions. In Graham v. Richardson, 403 U.S. 365 (1971), residency tests excluding aliens from public assistance were held unconstitutional. If an alien cannot be subjected to such residency tests it is plain that an American citizen from Puerto Rico cannot be either. In Dunn v. Blumstein, 405 U.S. 330 (1972), the Court held a durational residency test for voting to be constitutionally defective. Finally, in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), the Court held that a residency test for public hospital services was invalid.

In order to avoid the apparent constitutional infirmities of a residency requirement the defendants have contended that section 382 is merely a support statute, not

a residency requirement (22, 34),* and Judge Burke appears to have adopted that contention (41). While it is clear that section 382 is intended to prevent children from traveling into New York and then receiving public assistance,** even if the statute were in fact only what the defendants say it is, a three judge court would have to be convened for a determination of whether it is unconstitutional as applied. Steffel v. Thompson, 415 U.S. 452, 457 n.7 (1974); Department of Employment v. United States, 385 U.S. 355, 356 (1966); Query v. United States, 316 U.S. 486, 490 (1942); Stratton v. St. Louis Southwestern Ry. Co., 282 U.S. 10 (1930). The point is that, a statute is unconstitutional where its "inevitable effect is to prohibit the transportation of indigent persons across the [state] border." Edwards v. People, 314 U.S. 160, 174 (1941).***

In the face of these decisions it is apparent that there are grave constitutional infirmities with New York's attempt to again deny public assistance for persons who come

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* The position of the State Commissioner to this effect was set forth at p.2 ¶A of his joint memorandum of law with the local Commissioner in the District Court. See also the affidavit in opposition to an injunction or restraining order pending appeal or expedited appeal filed in this Court by David L. Birch, Deputy Assistant Attorney General, sworn to March 20, 1975, ¶4.

** One of New York's most respected Family Court Judges, Justine Wise Polier, thought the statute is just what the plaintiffs say it is - - a restriction on the right to travel. In re Paul and Mark, 315 N.Y.S. 2d 12, 18, 64 Misc. 2d 382, 389 (Fam. Ct. N.Y. Co. 1970;dictum).

*** As in Edwards there are criminal sanctions under New York's statutory scheme to further inhibit persons from bringing in out-of-staters. New York Social Services Law, section 389(1).

here from out of state. They should, claims the local social services department, "be sent back."(13) Plainly the plaintiffs' claims raise substantial constitutional claims which should be heard by a three-judge court. The District Court should be instructed how to proceed in this regard. See Gumer v. Shearson, Hammill Co., Inc., Dkt. no. 74-1643 (2d Cir. Dec. 16, 1974).

POINT II

EXHAUSTION OF STATE JUDICIAL REMEDIES IS NOT REQUIRED IN A CIVIL RIGHTS ACTION

The law is equally clear that "the availability of declaratory relief in [state] courts on ... federal claims is wholly beside the point." Lake Carriers Association v. MacMullan, 406 U.S. 498, 510 (1972). There the Court quoted from its prior opinion on this same point, and to the same effect in Zwickler v. Koota, 389 U.S. 241, 248 (1967):

> Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitors choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissable merely because state courts also have the solemn responsibility ... '... to guard, enforce, and protect every right granted or secured by the constitution...'

Of course, that is equally true of any sort of state judicial remedies, be they proceedings pursuant to CPLR Article 78 or any other sort. In Lane v. Wilson, 307 U.S. 268, 274 (1939), Justice Frankfurter pointed out that generally "resort to a federal court may be had without first exhausting the judicial remedies of state courts." In Monroe v. Pape, 365 U.S. 167, 183 (1961), the Supreme Court stated that state remedies "need not be first sought and refused before the federal [remedy] is invoked." That rule was expressly applied to claims like those here, under 42 U.S.C. section 1983 in McNeese v. Board of Edu-

cation, 373 U.S. 668, 672 (1963). In Preiser v. Rodriguez, 411 U.S. 475, 477 (1973), the Court stated, "If a remedy under the Civil Rights Act is available, a plaintiff need not first seek redress in a state forum." Only last term the Supreme Court reiterated this rule in Steffel v. Thompson, 415 U.S. 452, 472-473 (1974):

> When federal claims are premised on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) - - as they are here - - we have not required exhaustion of state judicial remedies, recognizing the paramount role Congress has assigned to the federal courts to protect Constitutional rights.

Indeed, the only case cited by the District Court, Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970) makes exactly the same point. Plainly the District Court erred in holding to the contrary.

In the affidavit in opposition to the appellant's motion for an expedited appeal and injunction pending appeal counsel for the defendant Abe Lavine has in effect conceded that state judicial remedies need not be exhausted, asserting that this "can be more properly characterized as a decision to abstain." (Affidavit of David L. Birch, Esq., dated March 20, 1975, pp. 5-6). That contention ignores the leading case in this Court on abstention in the three-judge court context, in which Judge Burke's dismissal on the basis of abstention was reversed.

In New York State Waterways Association, Inc. v. Diamond, 469 F.2d 419 (2d Cir. 1972) this Court succinctly stated the rule that "the decision to abstain is for the three-judge court, not for the single judge. Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971)." (469 F.2d at 423). Accord, Howard v. State Dept. of Highways, 478 F.2d 581, 583 (10th Cir. 1973). That plainly is the rule where, as here, the grounds alleged for abstention fit within "Pullman abstention," i.e. the need for a definitive ruling on uncertain questions of state law. See Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941). Indeed, just last term the Supreme Court pointed out that this discretionary decision to abstain requires a three-judge court, citing Abele v. Markle, supra; Steffel v. Thompson, supra at 457 n.7.

Moreover, the only ground advanced by Commissioner Lavine for abstention is that the meaning of the state statute is unclear under state law. The fact is, however, that all of the parties, including the State Commissioner, agree as to the meaning of section 382. All that is in dispute is whether or not the statute is unconstitutional. For example, in the affidavit of counsel for Commissioner Lavine it is asserted that "assistance was denied on the grounds that any person bringing a child into New York is responsible for that child's support." (Affidavit of David L. Birch, Esq., dated March 20, 1975, ¶2). It would be hard to argue to the

contrary since that statute provides, in relevant part,

> "1. Any person ... which shall bring, or cause to be brought, into the state of New York any child not having a state residence, or which shall receive or accept any child from outside of the State of New York, not having state residence, shall be responsible for the care and maintenance of such child. ..."

Since the State Commissioner believes the statute applies to the Cordovas and they have not contested its application except on Constitutional grounds there is nothing for the state courts to construe. The fact that the state courts have not construed this statute expressly is plainly no justification for abstention. As this Court recently stated, "a state statute may be clear even where, as here, it has not been ruled upon by a state court." Brown v. First National City Bank, 503 F.2d 114, 118 (2d Cir. 1974). Accord Nickerson v. Thompson, 504 F.2d 813, 816 (7th Cir. 1974); United States v. Livingston, 179 F.Supp. 9, 12-13 (E.D.S.C. 1959), aff'd 364 U.S. 281 (1960).

This is an action brought under 42 U.S.C. section 1983 alleging constitutional violations only. As this Court has pointed out, such "cases involving vital questions of civil rights are the least likely candidates for abstention." Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967). Accord, Mayor v. Educational Equality League, 415 U.S. 605, 628 (1974); Brown v. Spokane School District #81, 498 F.2d 840,

846 (9th Cir. 1974); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968). The social services commissioners have demonstrated no "special circumstances" sufficient to justify abstention, nor any uncertainty of state law. See Zwickler v. Koota, 389 U.S. 241, 248-249 (1967); Wright v. McMann, supra at 524.

Finally, even if abstention were proper here, which we have demonstrated it is not, the action should not have been dismissed but only held in abeyance pending resolution of the state law issues. The Supreme Court reiterated this earlier this year in Harris County Commissioners Court v. Moore, 95 S.Ct. 870 (1975),* where the Court stated:

> Ordinarily the proper course in ordering "Pullman abstention" is to remand with instructions to retain jurisdiction but to stay the federal suit pending determination of the state law questions in state court (95 S.Ct. at 878 n.14).

Accord, Zwickler v. Koota, supra at 244 n.4.

It could not be more clear that the decision by the District Court requiring exhaustion of state judicial remedies was in error. Even if that decision were interpreted as a decision to abstain, a reaching for which there is no basis whatsoever, the decision would still be in

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* In the Harris County case such a procedure could not be used because of a quirk of state procedure which prevented the state Supreme Court from granting relief under state law while the federal claims were retained before the federal court (95 S.Ct. at 878 n.14). No such problem exists in New York.

error - - Judge Burke sitting as a single judge did not have the power to make that determination, there was no unclear issue of state law requiring abstention, and dismissal was erroneous even if the lower court could have abstained.

POINT III

EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES IS NOT REQUIRED IN A CIVIL RIGHTS ACTION WHICH CHALLENGES THE CONSTITUTIONALITY OF A STATE STATUTE

Just as Eisen v. Eastman, supra, is directly contrary to the decision below on the question of exhaustion of state judicial remedies, so too is it to the contrary on the question of exhaustion of state administrative remedies. After an extensive analysis of several Supreme Court decisions in which the Court had not required exhaustion of administrative remedies, including several cases involving public welfare benefits, Judge Friendly concluded that

> The answer, we think, can be found in the later statement in King v. Smith, citing Damico, that a plaintiff in an action under the Civil Rights Act "is not required to exhaust administrative remedies, where the constitutional challenge is sufficiently substantial, as here, to require the convening of a three-judge court." (Id. at 569).

Moreover, the court specifically stated that insofar as the complaint attacked the constitutionality of the state law, "it is hard to see what an administrative hearing would have accomplished; the [state] relief agency could not declare the state statute unconstitutional." Id. at 569.

Here, too, the claim is sufficiently substantial to require the convening of a three-judge court,* so Eisen expressly does not require exhaustion of administrative remedies. Indeed, it is difficult to determine what an administrative hearing could have accomplished since plaintiff's sole claim is that the state statute is unconstitutional. In these circumstances, Eisen does not require exhaustion, but rather recognizes the futility of pursuing the administrative process. See also Carter v. Stanton, 405 U.S. 669, 671 (1972); King v. Smith, 392 U.S. 309, 312 n.4 (1968); Damico v. California, 389 U.S. 416 (1967).

Assuming - only for the sake of argument - that Eisen requires exhaustion in the circumstances of this case, then it must be concluded that Eisen has lost its vitality. Numerous decisions by the Supreme Court, including several after Eisen, have held that exhaustion of administrative remedies is not required in actions brought pursuant to the Civil Rights Act, 42 U.S.C. §1983. See, e.g. Steffel v. Thompson, supra; Gibson v. Berryhill, 411 U.S. 564 (1973); Carter v. Stanton, supra; Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 393 U.S. 639 (1968); Damico v. California, supra; McNeese v. Board of Education, 373 U.S. 668 (1968).

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* See Point I, supra.

In Houghton v. Shafer, supra, the Court concluded that resort to state administrative remedies is unnecessary in 1983 actions. Id. at 640. Eisen interpreted Houghton as merely being an application of the doctrine that exhaustion is unnecessary if it would be futile. Eisen v. Eastman, supra at 569. However, the Supreme Court clearly rejected this narrow reading of Houghton when it later stated:

> "There [Houghton] an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such administrative appeal was noted we hold that in 'any event, resort to these remedies is unnecessary.'"

Wilwording v. Swenson, supra at 251-52 (emphasis added).

More recently, the Court again ruled that exahustion is not required prior to institution of a civil rights action under Section 1983. In Steffel v. Thompson, supra at 472-73, the Court said:

> "When federal claims are premised on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) - as they are here - we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect Constitutional rights. (emphasis added)

Likewise Wilwording and Steffel cannot be explained away under the three-judge court exception stated in Eisen. Wilwording never was a three-judge court case, and in Steffel

the three-judge court claims had been abandoned on appeal.

This court, recently recognized in Plano v. Baker, 504 F.2d 595, 597 (2d Cir. 1974), that the "statements in various Supreme Court opinions appear to cast some doubt on that [exhaustion] requirement" and that the language in Steffel appears contrary to Eisen. However, the court did not decide whether Eisen retains validity but rather held that "the constitutional issues raised by this case ... lie within the expertise of courts, not the expertise of administrators." Id. at 599 (footnote omitted) Cf. Finnerty v. Cowen, 508 F.2d 979, 982 (2d Cir. 1974)*("'administrative agencies have neither the power nor the competence to pass on the constitutionality of administrative or legislative actions.'"). Of course, the constitutional issues raised here are equally outside the province of the Social Services Department.

Even under Eisen exhaustion is not required, but if the court concludes that Eisen requires plaintiff to exhaust administrative remedies before presenting his constitutional claims to the federal court, then it must reach the

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* In Finnerty this court suggested that the plaintiffs forego their three-judge court claims and seek declaratory judgment before the single judge (Id. at 986), thus abandoning the Eisen doctrine that only in a three-judge court was exhaustion not required.

issue which was not expressly resolved in Plano - namely, the present viability of the Eisen exhaustion requirement. Plaintiff submits that the absence of exhaustion of administrative remedies here in no way affects this case; it should be remanded for further proceedings at once.

CONCLUSION

For the foregoing reasons the judgment below should be reversed and the action remanded to the District Court with instructions to request the convening of a three-judge court.

Dated: April 10, 1975

Respectfully submitted,

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New York Social Services Law

§ 101. Liability of relatives to support

1. The spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person, provided that a parent shall be responsible only for the support of a child under the age of twenty-one years. Step-parents shall in like manner be responsible for the support of step-children under the age of twenty-one years.

2. The liability imposed by this section shall be for the benefit of the public welfare district concerned or any legally incorporated non-profit institution which receives payments from any governmental agency for the care of medically indigent persons, and such liability may be enforced by appropriate proceedings and actions in a court of competent jurisdiction. Such proceedings and actions may be brought by such an institution in any court wherein a similar proceeding or action could be brought by a public welfare official.

§ 382. Responsibility for children without state residence; license and board

1. Any person, institution, corporation or agency which shall bring, or cause to be brought, into the state of New York any child not having a state residence, or which shall receive or accept any child from outside of the state of New York, not having state residence, shall be responsible for the care and maintenance of such child whether placed out, boarded out or otherwise cared for unless adopted by foster parents. Such responsibility shall continue during the minority of such child and thereafter until he is self-supporting.

2. It shall be unlawful for any person, agency, association, corporation, society, institution or other organization, except an authorized agency, to bring, send or cause to be brought or sent into the state of New York any child for the purpose of placing or boarding such child or procuring the placing of such child, by adoption, guardianship, or otherwise, in a family, a home or institution, except with an authorized agency, in this state, without first obtaining a license from the board.

3. Application for a license shall be submitted on a form approved and provided by such board and be accompanied by proof that the applicant holds a license, or is approved by the board or similar body in the state where the applicant resides, or where its chief office is located, or where it has its place of business.

4. Before bringing, sending, or causing to be brought or sent into this state any child, the person, agency, association, corporation, society, institution or other organization, duly licensed as provided in this section must furnish the board a blanket indemnity bond of a reputable surety company in favor of the state in the penal sum of not less than one thousand dollars. Such bond must be approved as to form and sufficiency by the board and conditioned as follows: That such licensee (a) will report to the board immediately the name of each such child, its age, the name of the state, and city, town, borough or village, or the name of the country from which such child came, the religious faith of the parents of the child, the full name and last residence of its parent or parents, the name of the custodian from whom it is taken, and the name and residence of the person or authorized agency with whom it is placed or boarded, released or surrendered, or to whom adoption of guardianship is granted, and the death of such child or any reboarding, replacement or other disposition;

(b) will remove from the state within thirty days after written notice is given any such child becoming a public charge during his minority;

(c) will remove from the state immediately upon its release any such child who within three years from the time of its arrival within the state is committed to an institution or prison as a result of conviction for juvenile delinquency or crime;

(d) will place or cause to be placed or board or cause to be boarded such child under agreement which will secure to such child a proper home, and will make the person so receiving such child responsible for its proper care, education and training;

(e) will comply with section three hundred seventy-three;

(f) will supervise the care and training of such child and cause it to be visited at least annually by a responsible agent of the licensee; and

(g) will make to the board such reports as it from time to time may require.

5. In the event of the failure of such licensee to comply with the second and third conditions of the bond hereinbefore mentioned, and to remove, after thirty days' notice so to do, a child becoming a public charge, such portion of the bond shall be forfeited to the state or the county or municipality thereof as shall equal the sum which shall have been expended by the state or such county or municipality thereof for the care or maintenance or in the prosecution of such child or for its return to the licensee.

New York Social Services Law

§ 389. Penalty for violations

1. Except as hereinafter provided, any person, corporation, agency, society, institution or other organization, wilfully violating this title or failing to comply with any order which the board is authorized under this title to make, shall be guilty of a misdemeanor.

2. Any person, corporation, society, institution or other organization who or which violates the provisions of subdivision six of section three hundred seventy-four of this chapter shall be guilty of a misdemeanor, for the first such offense. Any person, corporation, society, institution or other organization who or which violates the provisions of subdivision six of section three hundred seventy-four of this chapter, after having been once convicted of violating such provisions, shall be guilty of a felony.

28 § 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 § 2281 THREE-JUDGE COURTS

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

United States Code, Title 42

42 § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 1975, I served the foregoing brief upon counsel for the appellees, Frank P. Celona, Esq., Department of Social Services, 111 Westfall Road, Rochester, New York 14620 and Hon. Louis J. Lefkowitz, Attn: David L. Birch, Esq., Deputy Assistant Attorney General, Two World Trade Center, New York, New York 10047, by causing copies to be mailed, postage prepaid, to them.

RENE H. REIXACH
Attorney